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IN THE

Supreme Court of the United States

DONALD P. ROPER, Superintendent,
Potosi Correctional Center,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

BRIEF OF THE COALITION FOR JUVENILE JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

JOSEPH D. TYDINGS
Counsel of Record
MIRIAM R. VISHIO
ERIN L. WEBB
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street NW
Washington, DC 20037-1526
(202) 785-9700

Counsel for Amicus Curiae

188479

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus, the Coalition for Juvenile Justice ("CJJ") is the national association of state advisory groups ("SAGs") on juvenile justice. Congress created the SAGs in the federal Juvenile Justice and Delinquency Prevention Act ("JJDPA") to further the legislation's purposes of protecting and rehabilitating juvenile delinquents[2] and "help[ing] delinquent youth return to a productive life." 42 U.S.C. § 5601(a)(11).

The JJDPA emphasizes the differences between juvenile and adult offenders. 42 U.S.C. §§ 5633(a)(11), (12), (13). So does its legislative history:

> "The United States has a long tradition of dealing differently with juveniles than with adults who are in difficulty with the law, in the hope that juveniles can be rechannelled into becoming law abiding citizens. However, many of the methods of dealing with juveniles in this country have come to be viewed either as counterproductive or as violations of the rights of children. Thus there is a pressing need for national standards to

1. The parties have consented to the filing of this brief and their letters of consent have been lodged with the clerk. Pursuant to Rule 37.6, we state that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amicus* or its counsel, has made any monetary contribution to the preparation or submission of this brief.

2. In this brief, the word "juveniles" means those under age 18 when their crimes were committed, and the terms "juvenile death penalty" and "juvenile execution" mean the execution of those who were under age 18 at the time of their crimes.

improve the quality of juvenile contacts with the justice system."

S. Rep. No. 93-1011, at 25-26 (1974) (quoting National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 247 (1973)), *reprinted in* 1974 U.S.C.C.A.N. 5283, 5290.

The members of the SAGs mandated by the JJDPA are appointed by the Governor or chief executive of their states or territories, whose political views run the gamut from very liberal to very conservative. Members of CJJ's Board of SAG Chairs (or their designees) serve on the CJJ Board of Directors. Nearly every state and territory has a SAG representative on CJJ's Board.[3]

CJJ is a diverse organization, composed of juvenile justice experts from many different disciplines. A varied group of juveniles, prosecutors, business professionals, law enforcement officers, social workers, probation officers, health and mental health professionals, lawyers, judges, and many others sit on the CJJ Board.[4] Some of the juveniles

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3. Of the fifty-six states and territories with State Advisory Groups, six currently choose not to be members of CJJ: California, Delaware, Maine, Nebraska, Ohio, and Texas.

4. For example, CJJ's recent past National Chairs include:

1999 – Chair of the North Carolina Governor's Crime Commission

2000 – Retired FBI Special Agent in Charge in Denver, Colorado

(Cont'd)

who participate have themselves been involved in the juvenile justice system. CJJ consists of state agency personnel working with those employed in the public sector.

The JJDPA defines CJJ's functions as:

- conducting an annual conference for the SAGs;
- "disseminating information, data, standards, advanced techniques, and program models";
- "reviewing Federal policies regarding juvenile justice and delinquency prevention"; and
- advising the Administrator of the Office of Juvenile Justice and Delinquency Prevention, Congress, and the President regarding juvenile justice issues and SAG perspectives.

42 U.S.C. § 5633(f)(2). In connection with those duties, CJJ has published Annual Reports, which survey current available research and provide information and recommendations about various topics relevant to juvenile justice issues. CJJ also holds training conferences and provides information to SAGs.

(Cont'd)

2001 – Retired Juvenile Court Judge and past President of National Council of Juvenile and Family Court Judges

2002 – Executive Director of Clackamas County Commission on Children and Families in Oregon

2003 – Supervisor of South Carolina Vocational and Rehabilitation Department

2004 – City Attorney in Burlington, Vermont

As noted by the Missouri Supreme Court, in the wake of *Stanford v. Kentucky*, 492 U.S. 361 (1989), CJJ has become part of the growing "national consensus" against executing juveniles for crimes committed before their eighteenth birthday. *Simmons v. Roper*, 112 S.W.3d 397, 410 (Mo. 2003). Specifically, in 1989, CJJ's Board of Directors unanimously adopted a resolution opposing the execution of individuals for crimes committed before their eighteenth birthday.[5] In 1992, CJJ supported the United Nations Convention on the Rights of the Child, largely because it would bar the execution of juvenile offenders. In 1994, CJJ expanded its 1989 resolution into a Position Paper that appeared in several subsequent CJJ Reference Directories given to all CJJ members.

In 2000 and 2002, respectively, CJJ wrote letters to the editors of the Washington Post and the New York Times, advocating against the execution of juvenile offenders. David Doi, CJJ Executive Director, *Youth Violence Facts*, Wash. Post, Jan. 22, 2000, at A18; Rodney Cook, CJJ National Chairman, *Executing the Young: Iran, Congo and Texas*, N.Y. Times, June 3, 2002, at A14. Specifically, the 2002 letter expressed CJJ's support for the Missouri Supreme Court's decision setting aside Christopher Simmons' death sentence. Also in 2002, Linda Hayes, the CJJ representative from North Carolina, and David Doi, CJJ's Executive Director, testified before the Georgia Board of Pardons and Parole on behalf of Alexander E. Williams, a death row inmate who had

5. "CJJ opposes the death penalty for any individual whose offense was committed before the age of 18." CJJ, *Death Penalty: Executing Young Offenders: Statement on Executing People who Have Committed Crimes as Minors*, http://www.juvjustice.org/resources/fs003.html (last visited June 22, 2004).

committed his crime at age 17. After the hearing, Williams' sentence was commuted to life in prison.[6]

SUMMARY OF ARGUMENT

The death penalty, as applied to those who were under age 18 when their crimes were committed, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Like the mentally retarded, juveniles have developmental limitations and deficiencies that make them less able to assist counsel, more prone to making false confessions, and more likely to be wrongfully convicted or wrongfully sentenced to death. As this Court held in *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), these characteristics "undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." This Court should reach the same conclusion here and categorically exclude juveniles from the death penalty.

Moreover, juveniles do not always receive the heightened procedural prctections this Court has deemed necessary to save the death penalty from unconstitutionality as "cruel and unusual" punishment. In fact, juveniles, despite being less culpable because of their deficiencies, often receive less procedural protection in capital trials than the average adult offender. Finally, the execution of juvenile offenders serves neither of the death penalty's stated goals of retribution or deterrence. Juveniles' reduced capacity makes them less

6. *See* Sandy Hodson, *Board Spares Killer's Life: Panel Grants Clemency Without Chance of Parole*, Augusta Chronicle (Georgia), Feb. 26, 2002, at A01 (also noting that CJJ, the National Mental Health Association, and the European Union were among those requesting clemency).

culpable offenders and keeps them from appreciating fully the consequences of their actions.

ARGUMENT[7]

I. Capital Trials In Adult Courts Impermissibly Endanger Fundamental Constitutional Rights Of Juveniles.

Atkins categorically excluded the mentally retarded from the death penalty. 536 U.S. at 317-21. This Court found that the mentally retarded faced an unacceptable risk of wrongful execution and that such a severe sanction did not materially advance the death penalty's societal purposes of retribution and deterrence. *Id.* Research conducted since this Court addressed the execution of juveniles in *Stanford* shows that, like the mentally retarded, juveniles also should be categorically excluded from execution, because they suffer from many of the same deficiencies as mentally retarded defendants, making them unable to utilize the basic constitutional protections and procedural safeguards of the Fifth, Sixth, and Fourteenth Amendments.

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7. CJJ does not here repeat, but does adopt, the Eighth Amendment arguments that will likely appear in the briefs for Respondent and Respondent's *amici*. As those submissions will undoubtedly point out, there is now a "national consensus" against executing those who were under age 18 when they committed their crimes, a consensus found not yet to have formed when the Court decided *Stanford* in 1989. This consensus is consistent with the fact that the reduced capacity of juvenile offenders increases the possibility of false confessions and contributes to the juveniles' lessened ability to give meaningful assistance to their counsel and make a persuasive showing of mitigation, all of which heighten the risk of wrongful execution.

For example, both juveniles and the mentally retarded have deficiencies in their reasoning and judgment faculties, and in their ability to control impulses. These deficiencies: (1) make it much more difficult, and often impossible, for them to assist their counsel or manage their own defense, denying their Sixth Amendment right to counsel; (2) create a heightened risk that they will falsely confess, denying them their Fifth Amendment right against self-incrimination; and (3) create a heightened risk of overly harsh sentencing. These characteristics of juveniles, like the characteristics of the mentally retarded, "undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards," *Atkins*, 536 U.S. at 317, and weaken the protections the Fifth and Sixth Amendments should provide juveniles.

Any erosion of procedural rights should not be countenanced when the penalty is death. "When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). In addition, CJJ's research reveals that children and youth require even more due process protections than adults, and that such protections need to be afforded in a timely and effective fashion. National Coalition of State Juvenile Justice Advisory Groups, 1992 Annual Report, *Myths and Realities: Meeting the Challenge of Serious, Violent, and Chronic Juvenile Offenders* 38 (1992) ("CJJ 1992 Ann. Rep.").[8] Yet, as explained below, juveniles' deficiencies, like those of the mentally retarded, effectively deny them fundamental constitutional protections.

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8. CJJ was previously called the National Coalition of State Juvenile Justice Advisory Groups.

A. Post-*Stanford* Research Shows That Juveniles, Like The Mentally Retarded, Have Developmental Deficiencies.

Research conducted after *Stanford* was decided demonstrates that there are critical physical, mental, and emotional differences between youth and adults, particularly in their ability to make decisions and to understand the long-term repercussions of their actions. CJJ, 2002 Annual Report, *An Examination of the Practice of Trying and Sentencing Youth in Criminal Court* 14-16 (2003) ("CJJ 2002 Ann. Rep.").

In its 1998 Annual Report on the juvenile court system, CJJ examined the differences between children and adults in the context of American civil laws. CJJ, 1998 Annual Report, *A Celebration or a Wake? The Juvenile Court After 100 Years* 43 (1998) ("CJJ 1998 Ann. Rep."). "Children and youth are deemed less responsible and mature than adults in many areas of everyday life. They must attend school pursuant to compulsory attendance laws, and they are protected from the harmful actions of their custodians by abuse and neglect laws." *Id.* Like school and abuse and neglect laws, "[c]hild labor laws acknowledge [children's] vulnerability in the work place, and movie and television rating systems likewise recognize their susceptibility to immoral or violent influences. We still take children and youth to pediatricians instead of internists, and we accept that their . . . health needs are quite different from adults." *Id.*

CJJ also noted that children "are held less accountable for their actions in many other areas of law — they can't hold property in their own names, or make wills, or enter into enforceable contracts, or enter the military on their own,

or vote." *Id.* "Why should we expect them to be fully accountable as though they were fully formed and developed adults for their irresponsible acts in the juvenile or criminal arenas?" *Id.*

American criminal law also recognizes the distinct differences between juveniles and adults. For example, "all states have enacted legislation of some form . . . mak[ing] it either a misdemeanor or a felony to aid, encourage, or cause any child under a specified age to become or remain delinquent, neglected, or dependent." James N. Kourie, Annotation, *Mens Rea or Guilty Intent as Necessary Element of Offense of Contributing to Delinquency or Dependency of Minor*, 31 A.L.R.3d 848, 850-51 (1970) (footnotes omitted). These types of laws recognize that juveniles are less developed, in many ways, than adults.

According to developmental experts relied upon by CJJ in its extensive review of the literature on this issue, juvenile offenders fail to comprehend the long-term consequences and effects of their actions and decisions. CJJ 1998 Ann. Rep. at 43. Indeed, CJJ's reports show that "[c]ertain parts of the brain — particularly the frontal lobe and the cable of nerves connecting both sides of the brain — are not fully formed in many adolescents, contributing to a large extent to teenage impulsivity and mood swings." CJJ 2002 Ann. Rep., *supra*, at 15. In addition, recent neurological studies show that during adolescence, the brain undergoes a period of massive reorganization, as explained by author and psychologist Michael J. Bradley:

> "[T]he most critical part of the brain develops 95 percent of its capacity in adolescence — it doesn't even begin to develop until you hit 11 or 12, and

> it doesn't finish until you're 19 or 20. It's the part that has to do with making good judgments, moral and ethical decisions, and reining in impulsive behavior."

Id. (citation omitted).

The post-*Stanford* research that illustrates the specific disabilities and other limiting characteristics of juveniles is consistent with the traditional view of juveniles in American jurisprudence. More than two decades ago, Justice Powell, writing for the majority in *Eddings v. Oklahoma*, stated that "'adolescents . . . are more vulnerable, more impulsive, and less self-disciplined than adults.'" 455 U.S. 104, 115 n.11 (1982) (citation omitted). As Justice Powell went on to observe:

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.

Id. at 115-16 (citing *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)) (footnotes omitted); *see also Schall v. Martin*, 467 U.S. 253, 265 n.15 (1984) ("'Our society recognizes that juveniles in general are in the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their

value systems have not yet been clearly identified or firmly adopted.'").

Juveniles' recognized limitations, which provide the basis for treating them differently under many civil laws, do not disappear when juveniles enter an adult criminal court. The diminished capacity of juveniles mirrors the limitations of the mentally retarded, and, we submit, likewise "undermine[s] the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Atkins*, 536 U.S. at 317. The concerns this Court expressed about procedural safeguards in *Atkins* are equally relevant to juveniles and should lead this Court, as they did in *Atkins*, to exclude juveniles categorically from execution.

B. Because Of Their Deficiencies, Juveniles Effectively Are Denied Their Sixth Amendment Right To Counsel.

Like the mentally retarded, juveniles "may be less able to give meaningful assistance to their counsel." *Id.* at 320. The diminished capacity of juveniles directly affects their ability to communicate with and direct their counsel, as well as their faculty for making important trial and procedural decisions. Many adolescent defendants, because of their relationship with authority and their developmental process, either do not perceive their attorney as being on their side or fail to give their attorney information about the charges against them out of mistrust. Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 15-17 (Mar. 1997). Juveniles' immature communication skills may also interfere with their ability to assist counsel. *Id.* at 16-17.

As CJJ noted in its 2002 Annual Report (at 15, 16):

- Juveniles' brain structure and cognitive ability may result in impaired judgment, hindering them throughout the legal process, particularly in a system designed for adults.

- Throughout the legal process, juveniles may experience difficulty comprehending "legal procedures and the consequences of various legal choices." With plea bargaining, for example, juveniles may not fully consider the implications of having a criminal record in favor of opting for the deal that will send them home the fastest.

- Juveniles may not understand the charges against them or what various legal rights mean, report relevant facts, or fully comprehend their counsel's role.

These impairments are further compounded by developmental delays, undiagnosed depression, attention deficit disorder or attention deficit hyperactivity disorder, learning disabilities, and/or mental illness, which commonly are found in juvenile offenders. *See id.* If an adolescent cannot cooperate with, effectively assist, and even direct her attorney in the preparation of her defense, she is effectively denied not only the right to counsel, but many other trial rights as well, such as the right to confront witnesses and the right to a jury trial.

The right to counsel is guaranteed by the Sixth Amendment to the U.S. Constitution and applied to the states through the Fourteenth Amendment. *Gideon v. Wainwright*,

372 U.S. 335, 342-43 (1963). "Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts." *Fare v. Michael C.*, 442 U.S. 707, 719 (1979).

This Court's jurisprudence recognizes "the unique role the lawyer plays in the adversary system of criminal justice in this country." *Id.*; *see also, e.g., Gideon*, 372 U.S. at 344-45; *Powell v. Alabama*, 287 U.S. 45, 67-68 (1932). It is not just the presence of counsel that is necessary for a fair trial, but "'the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).[9]

Juveniles have special needs for assistance in the legal process, as recognized by the movement in the United States to create separate, special courts for juveniles.

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him."

In re Gault, 387 U.S. 1, 36 (1967) (quoting *Powell*, 287 U.S. at 69) (footnote omitted).

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9. There are serious inadequacies in the delivery of effective legal services to juvenile offenders, however. Indeed, many juveniles are denied the right to counsel in juvenile courts, while others receive only perfunctory representation from counsel assigned to represent their interests. CJJ 1992 Ann. Rep., *supra*, at 38.

As the Court further explained in *In re Gault*:

"The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. The rights to confront one's accusers, to cross-examine witnesses, to present evidence and testimony of one's own, to be unaffected by prejudicial and unreliable evidence, to participate meaningfully in the dispositional decision, to take an appeal have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively. The most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot. Papers are drawn and charges expressed in legal language. Events follow one another in a manner that appears arbitrary and confusing to the uninitiated. Decisions, unexplained, appear too official to challenge."

Id. at 38 n.65 (quoting Report by the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 86-87 (1967)). *In re Gault* held that juveniles were constitutionally entitled to counsel and other procedural safeguards in delinquency proceedings. *Id.* at 41-42. Such concerns are significantly heightened when the juvenile appears in the adult criminal court, especially when the sentence could be death.

C. These Deficiencies Cause Juveniles Effectively To Be Denied The Fifth Amendment Right Against Self-Incrimination.

Juveniles, like the mentally retarded, have many difficulties in all aspects of the legal process — beginning with the police interrogation. CJJ's research reveals that juveniles are more likely, because of their immaturity, to make a false confession. CJJ 2002 Ann. Rep., *supra*, at 15-16. In addition, recent research has found that

> juvenile suspects share many of the same characteristics as the developmentally disabled, notably their eagerness to comply with adult authority figures, impulsivity, immature judgment, and inability to recognize and weigh risks in decision-making, and [they] appear to be at a greater risk of falsely confessing when subjected to psychological interrogation techniques.

Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 1005 (2004). For example, "one of the most common reasons cited by teenage false confessors is the belief that by confessing, they would be able to go home." *Id.* at 969.

This heightened risk of false confessions also creates an increased risk of wrongful conviction. "Interrogation-induced false confessions may lead to wrongful conviction either when a suspect pleads guilty to avoid an anticipated harsher punishment or when a judge or jury convicts the false confessor at trial." *Id.* at 960.

D. Juveniles Face An Impermissible Risk Of Overly Harsh Sentencing In Capital Trials Due To Their Difficulties In Showing Mitigating Factors.

Like the mentally retarded, juveniles "are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Atkins*, 536 U.S. at 321. Many adults have a negative perception of juveniles and feel particularly threatened by juvenile offenders. CJJ, 1997 Annual Report, *false images? The News Media and Juvenile Crime* 8-9 (1997). Thus, juveniles also face the "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Atkins*, 536 U.S. at 320 (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). This Court has acknowledged "the importance of treating the defendant's youth as a mitigating factor in capital cases." *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988).

The trial in this case illustrates the point. As this Court noted in *Atkins*, "reliance on mental retardation as a mitigating factor ~~can be~~ a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Atkins*, 536 U.S. at 321 (citing *Penry v. Lynaugh*, 492 U.S. 302, 323-25 (1989)). During the respondent's trial, the prosecutor made that very argument:

> In mitigation, the defense talked about 17-year-olds and their inability to think about the future, and about the fact that a person of 17 cannot vote or lawfully drink alcohol, but can be subject to the death penalty. The prosecutor used Simmons' age to argue that he should be put to death. The prosecutor's argument was: "Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary." The prosecutor seems to have implied that if Simmons was this bad at 17, he could only get worse.

Simmons, 112 S.W.3d at 416 (Wolff, J., concurring). Indeed, like the mentally retarded, juveniles have a "lesser ability . . . to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors." *Atkins*, 536 U.S. at 320. Juveniles "have had less time to develop ties to the community, less time to perform mitigating good works, and less time to develop a stable work history, than is true of adult offenders." *Simmons*, 112 S.W.3d at 413.

E. When Juveniles Are Defendants, The Heightened Procedural Standards Required In Capital Cases Are Not Met Due To These Deficiencies.

This Court has held that "the Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty. Otherwise, the constitutional prohibition against 'cruel and unusual punishments' would forbid its use." *Ring v. Arizona*, 536 U.S. 584, 614 (2002). CJJ's research reveals that children and youth require even more due process protections than adults. CJJ 1998 Ann. Rep., *supra*, at 43.

However, juveniles effectively receive fewer procedural protections than adults in capital trials. For that reason, capital punishment is "cruel and unusual" as applied to juveniles.

II. The Execution Of Juvenile Offenders Fails To Serve The Purposes Of The Death Penalty And Contravenes The Goals Of The Juvenile Justice System.

As demonstrated above, juveniles' developmental deficiencies preclude them from exercising fundamental constitutional rights and place them at an unacceptable risk of wrongful execution. We now show that the Court's death penalty jurisprudence provides a second reason to exclude juveniles categorically from execution: imposing the death penalty on such offenders does not measurably advance either of the death penalty's goals of "retribution and deterrence of capital crimes by prospective offenders." *Gregg*, 428 U.S. at 183; *see also Atkins*, 536 U.S. at 318-19.

A. Because Juveniles Are Less Culpable Than Adults, Juveniles' Execution Does Not Measurably Advance The Retributive Purpose Of The Death Penalty.

Like the mentally retarded, the diminished capacity of juveniles "diminish[es] their personal culpability." *Atkins*, 536 U.S. at 318. Therefore, retribution is not well served by executing juveniles, as they are not as culpable as adults. As this Court has recognized:

> [W]e assume that [children] do not yet act as adults do, and thus we act in their interest by restricting certain choices that we feel they are not yet ready to make with full benefit of the costs and benefits attending such decisions. It would be ironic if these assumptions that we so readily make about children as a class —about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own

> lives — were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for purposes of inflicting capital punishment.

Thompson, 487 U.S. at 825 n.23; *see also Eddings*, 455 U.S. at 114-15.

Since *Gregg*, the Court's jurisprudence has consistently narrowed the class of persons subject to the death penalty to those most deserving of execution, finding that the severity of the appropriate punishment necessarily depends on the offender's culpability. *Atkins*, 536 U.S. at 319. If the average adult murderer's culpability is insufficient to justify the imposition of the death penalty, as the Court reasoned in *Atkins*, then the lesser culpability of the juvenile offender surely does not justify it.

> "Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth."

Eddings, 455 U.S. at 115 n.11 (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 7 (1978)).

Juveniles and the mentally retarded similarly lack the same degree of moral culpability as fully functioning adults due to their cognitive impairments and impulsivity. Juveniles are considered "less morally, ethically and cognitively developed in much the same way that adult offenders with developmental delays and brain damage are sometimes seen by the court as less legally responsible for their actions." CJJ 2002 Ann. Rep., *supra*, at 15. In this way, juveniles are much like the mentally retarded; juveniles often have "significant limitations in adaptive skills such as communication, self-care, and self-direction" and "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins*, 536 U.S. at 318.

B. The Same Impairments That Make Juveniles Less Morally Culpable Also Lessen Their Ability To Appreciate Any Deterrent Effect; Therefore, Their Execution Does Not Measurably Advance The Deterrent Purpose Of The Death Penalty.

Juveniles' lesser ability to appreciate consequences and see the long-term impact of their decisions makes them poor candidates for deterrence. As this Court pointed out in *Atkins*:

> The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable . . . that also make it less likely that they can process the information of the possibility of execution as a

> penalty and, as a result, control their conduct based upon that information.

Id. at 320.

In addition, the juvenile death penalty has been so rarely applied in the last decade that it would be highly unlikely that 16 or 17 year olds would seriously consider the possibility of execution as a possible consequence of their criminal behavior. *Thompson*, 487 U.S. at 837 (discussing the lack of a deterrent effect due to the infrequency of executions of those age 15 and under). It is truly an "unusual" punishment for juveniles.

In short, the execution of juvenile offenders "ignores the substantial evidence of the greater vulnerability and impulsivity of youth and of the false sense of omnipotence and immortality that many juveniles have." CJJ 1992 Ann. Rep., *supra*, at 27. Because the execution of juvenile offenders fails to "measurably contribute[]" to either deterrence or retribution, the death penalty under such circumstances is "nothing more than the purposeless and needless imposition of pain and suffering" and hence an unconstitutional punishment. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

CONCLUSION

For the reasons stated above, and in the briefs for Respondent and the *amici curiae* supporting Respondent, the judgment of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

JOSEPH D. TYDINGS
Counsel of Record
MIRIAM R. VISHIO
ERIN L. WEBB
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street NW
Washington, DC 20037-1526
(202) 785-9700

Counsel for Amicus Curiae